81-6198

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

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SUPREME COURT, U.S.

SAMUEL PATRICK TOUCHARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Respectfully submitted,

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Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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SAMUEL PATRICK TOUCHARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Samuel Patrick Touchard, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in United States of America v. Samuel Patrick Touchard, C.A. No. 79-5198, entered on October 22, 1981.

## OPINION BELOW

On October 22, 1981, the court of appeals filed and entered its opinion affirming the conviction of the Petitioner. A copy of the opinion (not yet published) is attached as Appendix A. A petition for rehearing was denied on December 11, 1981 (A copy attached as Appendix B).

## JURISDICTION

On October 22, 1981, the court of appeals entered judgment affirming the conviction of the Petitioner for conspiracy to distribute heroin and cocaine between early 1973 and July 1977,

contrary to 21 U.S.C. §43,846. The petition for rehearing was denied on December 11, 1981. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by Title 28, United States Code, Section 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

I. Was the prosecutor's purposeful failure to provide certain exculpatory material under Brady v. Maryland such prejudicial prosecutorial misconduct and denial of due process as to have required the trial court to grant a mistrial?

Was it a related error to require that all defendants unanimously join in the motion for mistrial prior to it being granted?

II. Were other instances of prosecutorial misconduct such as stating:

> "If the Government were to introduce every record that were available in this case, we would need another jury room to get them all in. . ."

so prejudicial as to have required that the petitioner have been granted a new trial?

## CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> Fifth Amendment, United States Constitution

## STATEMENT OF THE CASE

The facts necessary to place in a setting the questions now raised can be briefly stated:

A. Course of proceedings in the district court and court of appeals.

The petitioner, Samuel Patrick Touchard, was indicted on August 10, 1978, for violating 21 U.S.C. §846. The general nature of the indictment was that he was a member of a conspiracy that did knowingly and intentionally possess with intent to distribute and did indeed distribute large quantities of heroin and cocaine, primarily between California and the state of Tennessee. The petitioner subsequently filed a change of venue motion, but such motion was denied. Through his court-appointed counsel, numerous pretrial motions were filed and heard.

The trial of this matter began on March 12, 1979, and lasted until May 7, 1979, at which time sentence was imposed upon the petitioner.

On April 24, 1979, the jury found the petitioner guilty on count 1 of the indictment. At the May 7 hearings, the petitioner was sentenced to a term of three (3) years, with a special parole term of three (3) years.

As has been stated earlier, the Sixth Circuit Court of Appeals on October 22, 1981, denied the relief requested by the petitioner and his co-defendants. A petition for rehearing was timely filed in this matter, but was also denied by the Sixth Circuit Court of Appeals on December 11, 1981. It is from the decision of the Sixth Circuit Court of Appeals that this petition for certiorari has been prepared.

B. Relevant facts concerning the issues presented in this petition for certiorari.

Because of the voluminous record created in this matter, the petitioner will only briefly summarize the evidence presented in the case as it pertains to this petition for certiorari. A more detailed examination will be presented when it is pertinent to a particular issue.

It should be pointed out at this time that the nature of the prosecution theory was that the petitioner, along with three other co-defendants, all of whom resided in California, were instrumental in transporting or causing to be transported to the Middle District of Tennessee large amounts of controlled substances, particularly heroin. The government's case was predicated primarily upon testimony of drug dealers from the Middle District of Tennessee area who were testifying for the government in return for varying considerations of leniency. The petitioner allegedly was involved in this conspiracy between 1973 and 1977. The government argued that there was an ongoing narcotics distribution network centered in Englewood, California, with a primary purpose of arranging heroin transactions with Nashville drug dealers. The petitioner was allegedly involved in this conspiracy and performed various tasks to facilitate the distribution of heroin, including having telephone numbers registered in his name, an apartment registered in his name and meeting one or more of the various heroin dealers in Los Angeles. One of the government's primary witnesses was a convicted drug dealer by the name of Ronald McKinley. McKinley testified that he on occasion had been in Los Angeles and was involved in the conspiracy.

## EXISTENCE OF JURISDICTION BELOW

As has been stated earlier, the petitioner was convicted in the United States District Court for the Middle District of Tennessee on the conspiracy count of the indictment.

The petitioner argues that the Sixth Circuit Court of Appeals has decided certain federal questions in a manner in conflict with applicable decisions of this Court and other well-reasoned decisions of other federal courts.

This will be discussed further in more detail.

## REASONS FOR GRANTING THE WRIT

The petitioner submits that for the reasons that are to be set forth in the following portion of this petition that the petition should be granted. Petitioner further would state that he feels that the Sixth Circuit has rendered a decision that on these questions is in conflict with decisions of other federal courts of appeals, and particularly as it pertains to the conduct of the prosecutor has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. There is also a possibility that the exact degree of prosecutorial misconduct has not fully been decided by this Court and that this case presents an appropriate forum to determine and settle this important issue of law, to-wit: The degree of misconduct that will be allowed a prosecutor without calling for reversal of a resulting conviction.

## ARGUMENT IN SUPPORT OF REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I. THE PROSECUTOR'S PURPOSEFUL FAILURE TO PROVIDE, AS REQUIRED UNDER BRADY V. MARYLAND, THE PRIOR JUDICIAL TESTIMONY OF RONNIE McKINLEY WAS PREJUDICIAL MISCONDUCT AND AS A RESULT THEREOF THE FAILURE OF THE COURT TO GRANT A MISTRIAL MOTION WAS ERROR. ALLOWING THE PETITIONER TO CROSS-EXAMINE McKINLEY THIRTEEN DAYS AFTER HIS INITIAL TESTIMONY WAS INEFFECTUAL TO CURE THE ERROR.

IT WAS FURTHER ERROR TO REQUIRE THAT ALL DEFENDANTS UNANIMOUSLY JOIN IN A MOTION FOR A MISTRIAL PRIOR TO IT BEING GRANTED.

DETAILED FACTS

On March 27, 1979, the government called Ronnie McKinley to testify on its behalf. Mr. McKinley testified extensively to his dealings with the petitioner and other individuals involved in the alleged conspiracy. At one point during Mr. McKinley's testimony, there was a day long hearing to determine if Mr. McKinley had been under the influence of drugs when he gave his grand jury testimony. After three days of testimony, Mr. McKinley's direct and cross-examined testimony was completed.

Thirteen (13) days later, the attorney for the co-defendant McLaughlin, informed the Court that he would like to cross-examine Mr. McKinley because the defense counsel had recently learned of the existence of Brady evidence which the government prosecutor had failed to turn over to the defense. (App. Vol. 1, p. 80-87). Mr. McKinley testified out of the jury's presence that in August of 1977, he was tried on a federal charge of conspiracy to distribute heroin. During that trial he testified that, contrary to his testimony in the present case, he had never sold drugs in his life and he had never been to California where the petitioner Samuel Patrick Touchard resided. Present at this prior testimony was Agent William Tucker of the D.E.A., the same agent who coordinated the prosecution against the petitioner in the present case and who was seated at counsel table. (Id., p. 88).

Agent Tucker testified that he was the case agent in charge of the investigation of Mr. McKinley, and that he was aware of Mr. McKinley's prior testimony that he had never been to California, and that he had informed the government prosecutor of the prior inconsistent testimony. (Id., p. 96).

Assistant U.S. Attorney Mr. Bob Lynch testified that he was aware of Mr. McKinley's prior inconsistent judicial testimony when he called Mr. McKinley to testify. (Id., p. 97). He was also aware of all defendants pretrial discovery motions requesting

the revelation of all Brady material. (Id. p. 97). He testified that he did not turn over a transcript of Mr. McKinley's prior judicial testimony. Mr. Lynch argued that he was not required to turn over this material because Mr. McKinley's prior testimony was in the public domain and was not under the exclusive control and possession of the government prosecutor. (Id., pp. 97-98, 101-120-121).

All five defense counsel testified that at some point prior to trial they had interviewed Mr. McKinley. (App. Vol. 1, pp. 102-117). Each one testified that while McKinley was in custody when interviewed, they were not aware of what charge he was being held on or if he had taken the stand in his own defense. When asked why they didn't inquire further into Mr. McKinley's prior trial and testimony, defense counsel for co-defendant Metoyer more accurately detailed the reason for the failure to do so:

> Because, Your Honor, until the very last time that I conferred with Mr. McKinley, which was the day before this trial started, Mr. McKinley told me that he wasn't going to testify, and he wasn't going to testify for the prosecution, and he wasn't going to say anything for the defendants.
>
> And in reality, Your Honor, I never got involved in any significant amount of conversation with him about what his testimony was going to be, because he told me right up to the last, "I am not going to testify in this case."
>
> He told me that the night -- the case started on Monday, and I saw him on Sunday night, and he told me he was not going to testify.
>
> (Appendix, Vol. 1, p. 122, L.L. 7-23)

Denying, inter alia, Samuel Patrick Touchard's motion for a dimissal, (App. Vol. 1, p. 123), the trial court found that while the failure of the government prosecutor to turn over the prior judicial testimony of Mr. McKinley was error, (Id., p. 124-125), it would not grant a mistrial unless all of the defendants joined in the motion. (Id., p. 126).

The next day, all defendants except for the defendant Orlando Sloan, made a Motion for a Mistrial. In response, the trial court said:

> This Court gave this matter a lot of thought last night, and I probably should not have offered the defendants an opportunity for a mistrial in this case.
>
> We have a peculiar case here. We have a case that is built on deals made with the government as its principal witnesses, and the principal witnesses have been carefully and extensively cross-examined about their interest in the lawsuit and the deals they have made, and their credibility has been substantially taxed.
>
> The fact that one of the principal witnesses committed perjury in a trial in which he was being tried for an offense similar to the offense alleged in this case is just another item on the -- that reflects on his credibility, and I think that it can be cured.
>
> As far as this record is concerned, I am permitting this witness to be called by the defendants for further cross-examination.
>
> If this were a different type of case, where the government's case depends solely on this witness' credibility, the Court might give some further thought to the matter, but taking the circumstances as a whole, this Court believes that this matter can be cured by tendering the witness for cross-examination, and the Court so holds.
>
> (App. Vol. 1, p. 138, L. 17 through p. 139, L. 15)

Mr. McKinley was subsequently recalled and on examination admitted that in his prior judicial testimony, he was lying, but that his testimony in this trial was truthful. (Id., pp. 140-146).

ARGUMENT

The prosecutor's constitutional duty to disclose evidence in its possession that is exclupatory and therefore favorable to a defendant was firmly established in Brady v. Maryland, 373 U.S. 220, 83 S.Ct. 1194 (1963). The Court went on to say,

> ". . . the suppression by the prosecutor of evidence favorable to the accused upon request violates due process where the

> evidence is material either to guilty of punishment, irrespective of the good faith or bad faith of the prosecutor".
>
> 373 U.S. 220, 83 S.Ct. 1194

Susbequent decisions of the Supreme Court have helped to define this prosecutorial obligation. In U.S. v. Agurs, 427 U.S. 97, 96 S.Ct.2392 (1976), the Court articulated three criteria for determining the materiality of undisclosed information whether it constitute a reversible error:

> 1. If the prosecutor has employed testimony which he knew, or should have know, was perjurious, the conviction must be reversed "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. 103, 96 S.Ct. 2397.
>
> 2. Whether the defense has made a general request for discovery or favorable evidence, or has made no request at all, there is no significant difference between the two and disclosure is required only where the evidence is "obviously exculpatory." 427 U.S. 107, 96 S.Ct. 2399. In these situations, the Court found the reversal is required only where "the omitted evidence creates a reasonable doubt that otherwise did not exist." 427 U.S. 112, 96 S.Ct. 2401.
>
> 3. If there has been a specific request for discovery in the prosecutor's failure to disclose, reversal will only be required if the "suppressed evidence" might have affected the outcome of the trial. 427 U.S. 104, 96 S.Ct. 2397. The Court further noted that the "failure (of the prosecutor) to make any response is seldom, if ever, excusable." 427 U.S. 106, 96 S.Ct. 2398.

The decision in Giglo v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972), rested upon, in addition to Brady, the earlier decisions of Mooney v. Hollihan, 294 U.S. 103, 55 S.Ct. 340 (1935), and Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959), that it violated a defendant's constitutionally protected rights of due process for the prosecution to use perjured testimony. The protection given by the due process clause is equally applicable where the Brady material could have been used to test the credibility of the testimony of a witness where the testimony is

crucial in determining the guilt or innocence of the defendant. The non-disclosure of Brady material affecting the witness' credibility will require reversal if the false testimony could have affected the judgment of the jury. 405 U.S. 153, 92 S.Ct. 766. In this case, the testimony of Ronnie McKinley was clearly critical to the issue of guilt.

Unlike the decision in U.S. v. Weidman, 572 F.2d 1199 (7th Cir. 1978) and Maglia v. Buckhoe, 515 F.2d 365 (6th Cir. 1975), wherein it was held that the defendant's rights to due process are not violated where the defendant in a criminal trial has full knowledge of the existence of evidence prior to the trial and makes no effort to obtain the production, defense counsel for all defendants in the present matter testified that they interviewed Mr. McKinley prior to trial, and he informed them that he would not testify at trial. Based upon this information, the defense counsels made no effort to attempt to locate evidence which might have affected the credibility of Mr. McKinley. The District Court fully accepted the defense counsel's explanation for their not attempting to locate Mr. McKinley's prior judicial testimony.

The District Court found that the prior judicial testimmony of Mr. McKinley was obviously exculpatory and favorable to the defendants because it raised questions as to whether Mr. McKinley, who was the beginning of this alleged conspiracy, had ever been to California and could have ever met the defendant.

Having found that the prior judicial testimony was material and exculpatory, the District Court was faced with the decision of how to cure this extreme prosecutorial misconduct. Initially the Court decided that it would grant a mistrial only if all the defendants joined in the motion. When it was evidence that Sloan would not join in the mistrial motion, the Court changed its mind and statd that the defendants would not be entitled to a mistrial but would instead be allowed to cross-examine Mr. McKinley in

front of the jury. The petitioner would submit that the District Court's remedy was insufficient to cure the purposeful prosecutorial misconduct.

The petitioner would submit that the trial court erred when he initially held that the granting of a mistrial would be conditioned on all defendants joining the motion. As noted in Bruton v. United States, 391 U.S. 123, 131, fn. 6, 88 S.Ct. 1620, 1625 (1968) that the joinder of numerous defendants in a single trial is to promote economy, efficiency and to avoid a multiplicity of trials but only where these objectives can be achieved without substantial prejudice to the right of each defendant to a fair trial. One must not forget that the joint trial is in reality a separate trial as to each defendant and must be treated as such. To condition a defendant's right to a mistrial upon the tactical considerations of his co-defendants is to overlook the individuality of each defendant's due process right to a fair and untainted trial.

The trial court in the present case stated that it should not have offered a mistrial as an option. The Court, however, does not possess the discretionary authority to allow the defendants a motion for a mistrial; it possesses only the authority to grant it or not. The petitioner in the present case made such a mistrial motion and the action of the trial court can only be construed as a denial of that motion. The failure to grant the mistrial motion was error.

Since 1824, trial courts have had discretion to declare a mistrial and to discharge the jury whenever there is a manifest necessity to do so or where the ends of justice would be defeated if a tainted trial was not terminated prior to a jury verdict. See, United States v. Perez, 22 U.S. 579 (1824). This supervisory authority of the District Court encompasses the right to create a

remedy to prosecutorial misconduct or bad faith. In United States v. Banks, 383 F.Supp. 389 (W.D. South Dakota, 1974), the court was faced with the situation, among other things, where the prosecutor had knowingly and purposefully failed to turn over to the defense a prior contradictory statement given to the F.B.I. by a government witness. The court said that,

> ". . . the prosecutors offering of testimony that was directly contradicted by a document in his possession was inexcusable. . . . If it was not a deliberate deception, it was, at least, grossly negligent conduct."
>
> 383 F.Supp. 395.

It was held that the pattern of prosecutorial misconduct warranted a dismissal of the indictment.

While the trial court did allow the defendants to cross-examine McKinley about this testimony later before the jury, this is insufficient to cure the error. The cross-examination was almost two (2) weeks later, and numerous witnesses later, was ineffective to truly test Mr. McKinley's credibility. The gap or delay in his cross-examination failed to produce the same effect upon the jury as that same cross-examination would have had immediately upon the witness being subject to cross-examination. Thus, unlike the decision in United States v. McGoven, 499 F.2d 1140 (1st Cir. 1974), where the court held that failure to disclose that a witness had been promised rewards in exchange for her testimony, would not require a mistrial because the witness was on the stand and the court allowed defense counsel to cross-examine her immediately, the defendants in the present case were not afforded the right of immediate cross-examination when it would have been most effective.

Evidence which would have questioned the credibility of whether Mr. McKinley was ever in California, a witness who was the beginning and one of the key government witnesses, can obviously raise doubts as to the guilt or innocence of the

petitioner Samuel Patrick Touchard. The failure to timely disclose the material impeachment evidence was prosecutorial misconduct so clearly negligent that it tainted the petitioner's ability to obtain a fair trial and required to court to grant a mistrial.

The trial court's allowing the defendants to cross-examine McKinley was an ineffective remedy to cure the prosecutorial misconduct and requires a granting of a new trial.

II. THE GOVERNMENT'S REBUTTAL CLOSING ARGUMENT THAT "IF THE GOVERNMENT WERE TO INTRODUCE EVERY RECORD THAT WERE AVAILABLE IN THIS CASE, WE WOULD NEED ANOTHER JURY ROOM TO GET THEM ALL IN" WAS IMPROPER AND SO PREJUDICIAL THAT THE DISTRICT COURT'S REMEDY WAS INADEQUATE TO CURE THE RROR.

THE OTHER INSTANCES OF PROSECUTORIAL MISCONDUCT ALSO WARRANT RELIEF.

DETAILED FACTS

In the closing arguments of petitioner's counsel and other defense counsel, it was correctly argued that the government had failed to produce a major portion of the records of the phone company to corroborate the government witnesses' testimony that they had called California on numerous occasions before making a trip to the West Coast. (See Vol. V, proceedings of May 1, 1979, pp. 1293-1296; Vol. V, proceedings of May 3, 1979, pp. 1583-1585). Prior to the government's closing rebuttal argument, a discussion was held concerning the permissible scope of the government's argument on the "missing documents". The District Court informed the prosecutor that he must confine his argument to the record, and inasmuch as the government had presented no proof on the reason for the unavailability of the records, he could not make reference to the reason for their unavailability. (Vol. V, proceedings of May 3, 1979, pp. 1618-1619).

> Thereafter, the government prosecutor argued:
>
> So, ladies and gentlemen of the jury, I respond -- he asked me -- he told me to come in here and respond to these questions,

> and every time he said -- and I will remind you, I'm not going to try to pull any wool over your eyes.
>
> Mr. Tenner asked me to respond to telephone tolls.
>
> Well, I have responded to the telephone tolls, ladies and gentlemen of the jury, and you consider the government's response to it.
>
> And after that response, it ought to be clear to you that those telephone tolls reflect these people who testified that made telephone calls and discussed heroin, that that's in fact what was happening.
>
> But I will go down the list, because he had some other questions about this list.
>
> Records of plane travel. The government didn't introduce any records of plane travel in this case.
>
> The government doesn't have to introduce -- the Court will instruct you that the government need not introduce records of every record that may be available.
>
> If the government were to introduce every record that were available in this case, we would need another jury room to get them all in here.
>
> (Appendix, Vol. 2, p. 949(A) L. 10 through p. 950, L. 8).

Counsel for all defendants, including Samuel Patrick Touchard, immediately objected to the argument. (Id.) There followed a discussion between all defense counsel, the prosecutor and the Court. (Id., pp. 1657-1671). The Court ruled that the argument was erroneous and instructed the government prosecutor to inform the jury that the government did not have any other records in its possession. (Id., p. 1672). Thereafter, the prosecutor argued:

> Ladies and gentlemen of the jury, the records of plane travel, the government does not have any records of any of the people involved in this case, any of their plane -- the business records of plane trips out there.
>
> (Appendix, Vol. 2, p. 965, L.L. 2-6)

The misconduct of the prosecution manifested itself in other ways during the course of the trial also. The prosecutor repeatedly laced the testimony of his witnesses with references to cocaine and marijuana, over the strenuous objections of all defendants. The U.S. Attorney justified this testimony based upon the fact that he had without basis included the word "cocaine" in the indictment, and had charged the petitioner and his co-defendants with its wholesale distribution. There was not one single sale of cocaine that was definitely established to any degree. The one sale that was vaguely alluded to was to a co-conspirator for his own personal use, and was not for distribution. App. Supp. 172(a), (b).

The court, at numerous points during the trial, warned the prosecution of "overkill" on the testimony regarding the other narcotics. He stated that normally he would never allow such evidence in; he did so in this case based upon the express representation of the prosecutor that he would prove distribution. App. Supp. 344(a), (b); 226(a)-(cc). The prosecutor clearly realized that he had no such evidence.

The defendants moved for a mistrial on the basis of the prohibition against prejudicial and inflammatory evidence, which was denied. The defendants also requested that the court strike all reference to cocaine and marijuana in the record. The court denied this motion, but stated:

> All right, Mr. Lynch, I don't feel comfortable about this cocaine business, I'll be perfectly frank with you about it, but I can't control the government or what they allege, but I don't feel comfortable about it.
>
> App. Supp. 1013(a).

The prosecutor's misconduct was also apparent in the general way he conducted the whole trial. During his very opening statement he made repeated references to the Nashville arrest of

defendant Metoyer and to the heroin that was allegedly found in his bag, both items which had been suppressed by the trial court previously. This breach was the subject of a motion for mistrial. During the course of the trial, the court had to admonish the prosecutor on numerous occasions not to throw temper fits, not to bang his fists on the table, not to shout out objections in front of the jury, not to make emotional statements without approaching the bench, not to refer to evidence which he clearly knew was inadmissible, not to get into inflammatory irrelevant issues, and not to make misrepresentations to the court. App. Supp. 386(a)-(e), 122(a).

This misconduct of the prosecutor even carried over into final arguments before the jury, in addition to the situation previously referred to. On one occasion he tried to get the jury to believe that an alleged drug dealer Calvin was a ficticious person in regards to the events that transpired. He stated" "The government can't find Calvin, because he is a John Doe. No one knows his last name. He can't be identified." There was absolutely no basis for this statement inn the evidence. It was just as bad as if the defense had stated that Calvin was not on trial because he had made enough money to run away and not be caught. The court immediately admonished him and required him to tell the jury that no such facts were present in the record to support that content. App. Supp. 976(a), (b). He also misstated the facts with regards to Eric Touchard's full name being on a list f und during a search of an apartment during the arrests. App. 978. Again, he was required to apologize to the jury and correct himself.

ARGUMENT

The purpose of closing arguments or summations is for the attorneys to assist the jury in analyzing, evaluating and applying

the evidence. When an attorney refers to evidence that was not produced or implies that evidence supporting the attorney's position exists but has not been introduced at trial, this exceeds the permissible scope of Argument and is error. See, United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978); United States v. Tasto, 586 F.2d 1068, 1069-1070 (5th Cir. 1978).

Not every instance of erroneous argument requires the reversal of the conviction; however, one must consider the degree to which the remarks complained of having a tendency to mislead the jury and to prejudice the accused; whether they were isolated or extensive; whether they were deliberate or accidentally placed before the jury; and the strength of the competent proof introduced to establish the guilt of the accused. United States v. Bowen, 500 F.2d 41 (6th Cir. 1974); United States v. Leon, 534 F.2d 667 (6th Cir. 1976). It is clear that in the present case the prosecutor's argument purposely exceeded the bounds of permissible argument and the trial court's specific instructions on the scope of the rebuttal argument. Requiring the prosecutor to turn right around and argue -- tongue in cheek -- that he didn't have the records, accomplished little to clear the jury's mind of this argument. The petitioner would submit that the argument was improper and the court's remedy was insufficient to cure this prosecutorial misconduct. The Sixth Circuit's decision in denying relief clearly misinterprets the impact of this type of misconduct. If it is admittedly error, any doubt should be resolved in favor of the petitioner.

## CONCLUSION

The petitioner Samuel Patrick Touchard submits that the judgment below the Sixth Circuit Court is a unique and erroneous departure from decisions of this Court and other federal jurisdictions which require that convictions that are tainted with prosecutorial misconduct be set aside. As such, the decision of the Sixth Circuit represents a departure from the high standards of which prosecutors are to be held in the prosecution of criminal cases. This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

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Nos. 79-5195/6, 5198 and 5245

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

O R D E R

V.

FILED

OCT 22 1981

JOHN P. HEHMAN, Clerk

ATHENS CARL McLAUGHLIN (79-5195)
GREGORY THOMAS METOYER (79-5196)
SAMUEL PATRICK TOUCHARD III (79-5198)
ERIC M. TOUCHARD (79-5245),

Defendants-Appellants

/

Before: WEICK and ENGEL, Circuit Judges and PECK, Senior Circuit Judge

All four defendants were convicted of count one of a nine-count indictment charging them with conspiracy to distribute heroin and cocaine between early 1973 and July, 1977, contrary to 21 U.S.C. §§ 843, 846. Defendant McLaughlin was convicted of counts 4, 6 and 7, charging him with possession with intent to distribute and distribution of heroin during certain periods of time within the period of conspiracy. Metoyer was also convicted of count 6. Defendants raise a number of issues in common and certain defendants, particularly McLaughlin, challenge the adequacy of the evidence supporting their conviction of the substantive charges.

Upon a careful review of the record as a whole, the court is of the opinion that the government properly charged and proved a single criminal conspiracy involving the sale and distribution of heroin between California and Tennessee and that the involvement of each defendant in that conspiracy was sufficient to support his conviction on that count. The court also finds sufficient evidence to support the conviction of McLaughlin on the substantive

Appendix A

charges of counts 4, 6 and 7, and to support Metoyer's conviction on count 6.

The court is further of the opinion that there was no fatal variance between the proofs and the allegations in the indictments.

The defendants charge several instances of prosecutorial misconduct. Their primary misconduct claim is based on Brady v. Maryland, 373 U.S. 83 (1963). In particular, they claim that the government prosecutor deliberately withheld information known to him but not to the defendants that a key government witness, one McKinley, had in previous criminal trials denied the sale of drugs or having ever been to California for the purpose of buying drugs. This previous testimony was flatly contradicted by McKinley's testimony in this case. The information came to light later in the trial and United States District Judge L. Clure Morton, after carefully considering the matter, denied the several motions for mistrial and for dismissal of the indictments for misconduct. While it is true that Judge Morton initially offered to grant a new trial upon the condition that all defendants consent thereto, it is apparent from the record that his ultimate decision to continue on in the present trial was based upon his conclusion that the Brady violation was curable. He permitted ample cross-examination, offered any necessary adjournment of the trial for counsel to investigate, and gave strong curative instructions to the jury, all of which we conclude were adequate to cure the taint of the government misconduct. See United States v. Enright, 579 F.2d 980, 989-90 (6th Cir. 1978).

The court has carefully examined the other allegations of prosecutorial misconduct and concludes that while the conduct of the prosecution at times left much to be desired, at no time did it rise to the level of reversible error or deny to any defendant the

essentials of a fair trial. Moreover, Judge Morton's curative instructions substantially weakened the overall effect of the prosecutor's indiscretions.

In the course of the execution of a search warrant of the apartment allegedly occupied by Eric Touchard, the government seized a paper containing 32 names, each with a number beside it. This seizure, the defendants assert, was outside the scope of the warrant. Defendants also dispute the government's claim that the exhibit was in "plain view", thus making the seizure lawful under that exception to the warrant requirement. The court is of the opinion that the document does come within the plain view exception to the warrant requirement. See Coolidge v. New Hampshire, 403 U.S. 443, 446 (1970)(plurality); United States v. Truitt, 521 F.2d 1174 (6th Cir. 1975). Plaintiffs' reliance upon United States v. Gray, 484 F.2d 352 (6th Cir. 1973), is misplaced because the search warrant in question here, which called for the search and seizure of evidence indicating ownership and possession of the apartment, justified the closer inspection which led the officers to reasonably conclude that they had discovered an incriminating document. The defendants' claim that this exhibit was not sufficiently authenticated is also without merit.

The defendants claim that the aforementioned errors singly and particularly in combination produced a trial such as that which had been the concern of the United States Supreme Court in Kotteakos v. United States, 328 U.S. 750 (1946); Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J., concurring), and that each defendant was denied the right to have his own involvement

and evidence thereof separately considered. The court is of the opinion that the trial, while long, was not basically unfair and that Judge Morton's governance of it avoided the errors of those cases. In addition, the court finds no reversible error in Judge Morton's instructions to the jury.

Each of the four defendants, McLaughlin, Metoyer, Eric and Samuel Touchard, received a special parole term of three years as part of his sentence for the conspiracy conviction. Each sentence was imposed prior to the United States Supreme Court's decision in Bifulco v. United States, 447 U.S. 381 (1980). As the government concedes, Bifulco requires that the special parole term aspect of each defendant's conspiracy sentence be vacated. Accordingly,

IT IS ORDERED that each defendant's sentence is vacated and the cause remanded to the district court for resentencing in accordance with this order. The judgment of the district court in each appeal is affirmed in all other respects.

ENTERED BY ORDER OF THE COURT

John D Hilleman

Clerk

Nos. 79-5198 and 79-5245

FILED

DEC 1 1981

JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

O R D E R

V.

SAMUEL P. TOUCHARD, III (79-5198)
ERIC M. TOUCHARD (79-5245)

Defendants-Appellants

Before: WEICK and ENGEL, Circuit Judges and PECK, Senior Circuit Judge

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendants-appellants has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman

Clerk

Appendix B

81-6198

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

RECEIVED
FEB 9 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SAMUEL PATRICK TOUCHARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO
PROCEED
IN FORMA PAUPERIS

Pursuant to 18 U.S.C. §3006A(d)(6) and Rule 53 of this Court, the Petitioner, Samuel Patrick Touchard, asks leave to file the attached Petitioner for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of fees or costs and to proceed in forma pauperis. The Petitioner was represented by counsel appointed pursuant to 18 U.S.C. §3006A in the district court and on appeal to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MICHAEL NOEL
Chancery Building
421 Charlotte Avenue
Nashville, Tennessee 37219
(615) 256-5003

Attorney for Petitioner

81-6198

RECEIVED
FEB 9 1982
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SUPREME COURT, U.S.

IN THE
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OCTOBER TERM, 1981
No. _____

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SAMUEL PATRICK TOUCHARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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MOTION TO CONSOLIDATE ALL PETITIONS
FOR CERTIORARI
IN THESE MATTERS

Comes now the attorney for the petitioner Samuel Patrick Touchard and would show to the Court that it is his understanding that at least three other co-defendants, Athens Carl McLaughlin (79-5195) and Gregory Thomas Metoyer (79-5196) and Eric Touchard (79-5245), are also going to file petitions for certiorari as concerns the decision of the United States Court of Appeals for the Sixth Circuit filed on October 22, 1981. All of these parties were co-defendants at the trial held in the Middle District of Tennessee in 1979.

These cases were all consolidated for oral arguments and briefing before the United States Court of Appeals for the Sixth Circuit. They have in all respects always been consolidated. The issues that would be raised in the various petitions for certiorari are common to each of the defendants who participated at the trial below and who seek review of the decision of the Sixth Circuit Court. Since these cases are sought to be reviewed

on certiorari to the same Court and involve identical or closely related questions, it is requested that this petitioner be allowed to participate in any hearings that are granted to other petitioners, and further, that these individual petitions for certiorari be consolidated pursuant to the spirit of Rule 19 of the United States Supreme Court Rules.

Respectfully submitted,

MICHAEL NOEL
Chancery Building
421 Charlotte Avenue
Nashville, Tennessee 37219
(615) 256-5003

Attorney for Petitioner

CERTIFICATE

I certify that I have provided a copy of this motion to the following counsel:

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4. Mr. Lionel R. Barrett, Jr.
   Attorney at Law
   211 Printers' Alley Building
   Nashville, Tennessee 37201
   Attorney for Appellant Eric Touchard

on this the 8th day of February, 1982.

MICHAEL NOEL